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No. 02-679

IN THE

Supreme Court of the United States

DESERT PALACE, INC. DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF ANN B. HOPKINS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF ANN B. HOPKINS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

Ann Hopkins was the respondent in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a Title VII case. The Court held that she had proved that gender-based stereotypes played a substantial, motivating role in Price Waterhouse's refusal to admit her to the partnership in 1983; this meant that the firm could avoid liability only by proving that it would have made the same decision—partnership denial—for lawful reasons in a bias-free setting. The Court also ruled that Price Waterhouse must make the requisite showing by preponderant evidence and remanded on that issue, since the lower courts had applied a clear and convincing evidentiary standard.

The case had been tried before Judge Gerhard Gesell as *Hopkins v. Price Waterhouse*, 618 F.Supp. 1109 (D.D.C. 1985), and it came to this Court after the District of Columbia Circuit affirmed Judge Gesell's finding of liability, 825 F.2d 458 (D.C. Cir. 1987). Following remand from the Court, Judge Gesell applied the preponderance of the evidence standard and again found Price Waterhouse liable under Title VII for its denial of partnership to Ms. Hopkins. He ordered the firm to admit her as a partner, at the same level of compensation as if she had been admitted in 1983. 737 F.Supp. 1202 (D.D.C. 1990). The D.C. Circuit affirmed, 920 F.2d 967 (D.C. Cir. 1990), and Ms. Hopkins (who had been constructively discharged) returned to Price Waterhouse as a partner in February 1991. She retired in 2002 after a

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certifies that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

successful career as a partner on the management consulting side of the business.

Ann Hopkins is the only person ever admitted to partnership under Title VII by judicial order. She remains committed to the principles established by her case, including those relating to stereotyping, proof of violation, and strong and meaningful relief. She regularly lectures on her experience seeking to become a partner at Price Waterhouse, most recently in February 2003 at the Peter F. Drucker Graduate School of Management at Claremont Graduate University, and in March at the Georgetown University Law Center. And she chronicled her experience in a well received book, *So Ordered: Making Partner the Hard Way* (University of Massachusetts Press, 1996).

Ms. Hopkins tells her audiences that companies will continue to have serious problems defending EEO actions until diversity becomes a core value of management. It always was on her watch.

STATEMENT

1. *Introduction.* The task in this case is to determine the circumstances giving rise to a jury instruction on dual motivation. The *en banc* decision of the Ninth Circuit, Petitioner's Appendix (Pet. App.) 1a, said that circumstantial evidence could trigger such an instruction, while most other courts of appeals have favored direct evidence. In fact, a preoccupation with the nature of the evidence—direct or circumstantial—is not helpful in assessing whether a dual motivation instruction should be given in a particular case. Instead, it makes more sense to see if the factual situation is one which is likely to produce a mix of motives.

In general, mixed motives are likeliest to arise in situations in which the decision-maker is influenced by someone acting from bias. In such circumstances, there may well be lawful influences too, so the ultimate decision is the product of both permissible and impermissible motives. That was exactly the

situation in *Price Waterhouse v. Hopkins*, where both biased and unbiased partners influenced the firm's decision-making body, its Policy Board. It was the nature of the decision-making process in *Price Waterhouse*, more than the type of evidence on which Ann Hopkins relied, that justified dual motivation treatment in that case. This remains true today.

2. *Factual Background.* Petitioner Desert Palace, Inc., which does business as Caesars Palace, appealed following an adverse jury verdict from the district court's denial of its motion for judgment as a matter of law under Rule 50, F.R.Civ.P. In such circumstances, a court "should review all of the evidence in the record." It "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." The court must also "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). This Statement views the record from respondent Catharina Costa's perspective, as *Reeves* requires.

Costa worked as a forklift operator in the warehouse at Caesars Palace in Las Vegas from 1987 to 1994, when she was fired. Pet. App. 55a-56a. A member of the Teamsters, she was the only woman in the bargaining unit. *Id.* at 56a. There is no dispute either that she was a capable worker, or that she was subjected to discipline throughout her seven-year tenure. *Id.* at 3a.

At trial, Costa presented evidence that her harsh treatment—including the denial of overtime assignments as well as frequent discipline, culminating in her firing—was the result of her gender. For example, she testified that men who arrived to work late were given overtime to make up for the lost time, while she was written up whenever she was tardy (one minute in one case). In similar fashion, Costa was disciplined for missing work for medical reasons; men were not. Only Costa was reprimanded when a number of employees—all the rest men—were eating soup in the office

on a cold day. And she was disciplined for profanity and for allegedly hazardous operation of equipment, while nothing happened to men who engaged in such conduct. Pet. App. 3a-4a.

It was undisputed that Costa received less overtime than the men. When she asked why one man was being preferred, she was told that he "has a family to support." Pet. App. 5a.

Costa's evidence showed that Caesars declined to act when co-workers subjected her to raw, sex-linked commentary. Most egregious, Costa was suspended for three days after complaining that a co-worker called her a "fucking cunt," ostensibly because she had provoked him into using this crude epithet. Pet. App. 5a-6a.

There was also evidence that the company viewed Costa through the prism of sexual stereotypes, for example calling her "strong willed" and "opinionated" and "confrontational," although there was testimony that she generally got along well with people. And the official who approved Costa's termination, herself a woman, said that she wanted to "get rid of that bitch." Pet. App. 5a.

Costa was fired after an altercation with another employee, a man who was angry with her and who had sought her out. He found her in an elevator in the warehouse. Costa testified that he attacked her and shoved her against the elevator wall, bruising her arm. Her testimony was believable, in part because she had reported the incident in detail immediately after it happened. In addition, photographs documented her bruises, and a witness reported seeing the man blocking the elevator door. In contrast, the man did not report the incident contemporaneously, and his later statements about it were contradictory. He initially denied, for example, that anything physical had occurred, then later said that Costa had hit him. Pet. App. 6a.

Caesars chose not to believe Costa. Instead, the company fired her. The man in question was given a five-day suspension. Pet. App. 6a-7a.

At trial, Costa contended that she was fired because of her sex, in violation of Title VII. Caesars defended by saying that the firing was justified by Costa's disciplinary record and was not the product of sex-based bias. Following the close of testimony, the district judge instructed the jurors that, to find for Costa, they had to determine both that she had been subjected to adverse actions on the job, and that her gender was a "motivating factor" in the taking of these actions. Joint Appendix (JA) 32-33 (Instruction No. 8). Caesars did not object to this instruction.

The judge also instructed the jurors that Caesars was liable if they found that sex discrimination was a motivating factor in Costa's treatment (including her firing), even if they found that her treatment was also motivated by a lawful reason; but the judge said that no damages should be awarded to Costa if Caesars proved that it would have taken the same actions anyway for lawful reasons. JA 33 (Instruction No. 9). Caesars objected to the giving of this or any instruction suggesting the possibility of dual motivation, but the company did not object to the formulation of the instruction itself ("I'll agree with the Court, that it is a reasonable statement of the mixed motive instruction"). JA 18. As Caesars notes, Costa did not request Instruction No. 9. Brief for Petitioner at 8 n.4.

The jury specially found that Costa's gender was a motivating factor in Caesars' treatment of her, that the treatment was motivated by both her gender and by lawful reasons, but that Caesars did not prove that the same decisions would have been made in the absence of discrimination. JA 40. The jury awarded Costa some $64,000 in financial loss, $200,000 in compensatory damages for nonpecuniary loss (later reduced to $100,000 on

remittitur), and $100,000 in punitive damages (later vacated by the court of appeals). *Id.* at 41. The monetary awards are not at issue here.

SUMMARY OF ARGUMENT

This case explores the factors needed to trigger mixed motive analysis under Title VII. In addressing this issue, the courts of appeals have generally focused on the type of evidence offered by the plaintiff—direct or circumstantial—with most favoring direct evidence (variously defined). This approach is misguided, because a dual motivation test relying on direct evidence (however defined) yields results that are both over- and under-inclusive. That is, there are cases involving direct proof—even "smoking guns"—in which an instruction on dual motivation is not appropriate. Conversely, such an instruction is justified in some cases built entirely on circumstantial (*i.e.*, inferential) evidence.

It is a mistake to focus solely on the *type* of evidence adduced by the plaintiff—direct, circumstantial or a combination of the two—in considering the circumstances warranting a dual motivation instruction. More important are the roles of the actors who made, or influenced, the personnel decision challenged by the plaintiff.

1. Most Title VII cases scrutinize the motives of the person who actually made the decision in question (which may not necessarily be the person with formal decision-making authority). Some cases, however, concentrate on the person (or people) who influenced the decision-maker, although they did not themselves make the decision. If these "agents of influence" harbored a discriminatory motivation—and if the actual decision-maker relied on their views—then the ultimate decision is the product of bias. This is what happened in *Price Waterhouse v. Hopkins*, where the firm's Policy Board—which made the decision rejecting Ann Hopkins' candidacy for partnership—relied on the views of partners that were grounded in gender-based stereotype.

As in *Price Waterhouse*, such situations may well involve lawful as well as unlawful motives, since the actual decision-maker may also have relied on nondiscriminatory factors, and it may be difficult to determine the dominant motive (assuming that a single motive dominated). Hence an instruction on dual motivation is often proper where a biased "agent of influence" plays a role in a shaping the decision.

2. The typical, garden variety Title VII case focuses on the motives of the decision-maker himself (as opposed to a biased "agent of influence"). And here a dual motivation instruction is *not* appropriate, even if the evidence of the decision-maker's bias is direct and palpable. This is because cases focusing on the actual decision-maker are usually suitable for treatment under the "pretext" model, *see Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and they almost always devolve into a choice between two ostensibly dominant motives—one unlawful, the other lawful. The logic of *Burdine* compels just such a choice. If in these circumstances the jury rejects the defendant's story and finds that it is merely a pretext for discrimination, the defendant is not entitled to a "second bite at the apple" to argue that it would have made the same decision anyway in the absence of bias.

3. Today, following enactment of the Civil Rights Act of 1991, an instruction on dual motivation has two components: (1) a statement that the plaintiff will establish liability by proving that prohibited bias was a "motivating factor" in the personnel decision at issue, even if lawful factors also motivated the decision, *see* 42 U.S.C. § 2000e-2(m), and (2) a statement that the defendant can avoid damages by proving that the same decision would have been made for lawful reasons in an unbiased setting, *see* 42 U.S.C. § 2000e-5(g)(2)(B).

Many courts assume that a dual motivation instruction invariably benefits the plaintiff, and that plaintiffs will strive

to secure such an instruction. This is not so. Given the 1991 Act, the first component in a dual motivation instruction does not aid the plaintiff, because it sets forth the liability standard under Title VII generally, not just in mixed motive cases; indeed, the same language appears in instructions explaining pretext analysis under *Burdine*. And the second component of the instruction on dual motivation plainly benefits the *defendant*—not the plaintiff—because it provides an escape hatch to avoid the imposition of damages even though liability has been established. In this regard, Caesars Palace's brief is bereft of any explanation showing how the company was prejudiced by the instruction challenged here.

I. TITLE VII'S TWO PROOF MODELS

Catharina Costa challenged a number of discrete "adverse work conditions" at Caesars Palace, of which the most significant was her firing. Following the close of evidence at trial, the district court instructed the jury—without objection—that Costa had the burden of proving that her "gender was a motivating factor in any such work conditions imposed upon her." JA 33.

The court also gave an instruction on dual motivation:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly

> even if the plaintiff's gender had played no role in the employment decision.

JA 33. Caesars agreed that this was "a reasonable statement of the mixed motive instruction," JA 18, but objected to the jury's being instructed at all on dual motivation. JA 17-18.

Mixed motive analysis constitutes one of the two principal models of proof in cases of intentional discrimination (or disparate treatment) under Title VII. It is necessary to understand the operation of both models in order to discern the boundary between them.

A. The Pretext Model and the Single Dominant Motive

The "factual inquiry" in a case of disparate treatment arising under Title VII is "'whether the defendant intentionally discriminated against the plaintiff.' * * * In other words, is 'the employer . . . treating "some people less favorably than others because of their race, color, religion, sex, or national origin."'" *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (citations omitted).

In light of this "factual inquiry," disparate treatment cases focus on the motivation animating the challenged conduct. On infrequent occasions, there is a "smoking gun" revealing that the employer acted for a discriminatory reason. Guns rarely smoke, however, so the Court has developed a framework for handling the type of proof more typically seen in Title VII litigation. First, the plaintiff employee must establish a prima facie case of discrimination; the defendant employer must then respond by articulating a lawful reason for the challenged conduct; and finally the plaintiff has the opportunity to prove that the articulated rationale is not the defendant's true reason but is instead a "pretext" for bias. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509

U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The Court has over the years refined the original *McDonnell Douglas* model. Thus *Burdine* clarified that the defendant's burden in responding to a prima facie case is one of production, not proof. 450 U.S. at 254. And *Hicks* and *Reeves* explained that "the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff," but that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 146-47 (emphasis in original).

It is sometimes suggested that the *McDonnell Douglas/Burdine* method of analysis applies only to indirect, circumstantial proof. This is not so. The Court has recognized that plaintiffs may at times be able to marshal evidence that more directly reflects a discriminatory motive, and the pretext model can accommodate such proof. In particular, a plaintiff who establishes a prima facie case

> must have the opportunity to demonstrate that the [defendant's] proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this *either directly by persuading the court that a discriminatory reason more likely motivated the employer* or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256 (emphasis added).

In fact, the record in many Title VII (and other EEO) cases consists of circumstantial evidence coupled with snippets of more direct proof. In *Reeves*, for example, which arose under the Age Discrimination in Employment Act, the plaintiff elicited evidence showing that the actual decision-maker responsible for his firing was a man named Chesnut. 530

U.S. at 152. Substantial circumstantial evidence strongly suggested that the firing was the product of age bias. Id. at 142, 151-52. In addition, there was also evidence that more directly reflected Chesnut's bias. In this regard, the plaintiff said that "Chesnut had told him that he 'was so old [he] must have come over on the Mayflower' and, on one occasion when petitioner was having difficulty starting a machine, that he 'was too damn old to do [his] job.' " 530 U.S. at 151. The Court found this evidence significant, ruling that the Fifth Circuit had "failed to draw all reasonable inferences in favor of" the plaintiff when it "acknowledg[ed] 'the potentially damning nature' of Chesnut's age-related comments [but] discounted them on the ground that they 'were not made in the direct context of [the] termination.'" 530 U.S. at 152.

Many cases, like *Reeves*, are a hybrid of direct and circumstantial evidence. Yet, as *Reeves* shows, the pretext model of proof developed in *McDonnell Douglas* and *Burdine* is still the appropriate vehicle for analysis, even with direct evidence in the picture.

The genius of *Burdine* is not so much that it deals with circumstantial evidence, but rather that it "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination," 450 U.S. at 255 n.8, and channels "the factual inquiry . . . to a new level of specificity," *id.* at 255, in which the plaintiff's prima facie showing of bias is pitted against the employer's plausible nondiscriminatory rationale. In the end, the trier of fact (typically a jury) "must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716.

This type of binary analysis is possible in most Title VII cases, whether or not direct evidence is involved. Even if the plaintiff produces a smoking gun—for example, a witness who claims to have overheard the new boss say that "I fired him because I can't stand blacks"—the boss will likely deny that he ever uttered anything of the sort and will swear that he

had a valid reason for the firing. The jury must decide whom it believes, and the decision is up or down.

B. Mixed Motive Analysis: *Price Waterhouse v. Hopkins* and the Civil Rights Act of 1991

Not every case fits neatly in the *Burdine* box, and *Price Waterhouse v. Hopkins* did not. This was not because Ann Hopkins produced direct evidence of bias, but rather because *Burdine* focuses on the truth or falsity of the reasons articulated by the decision-maker. And the decision- making body in *Price Waterhouse* was the firm's governing Policy Board, whose members could honestly recite seemingly valid reasons for rejecting Hopkins, based on the information available to them, in particular the comments of partners.

In these circumstances, Hopkins prosecuted her case by focusing less on the motives of the decision-makers themselves—the members of the Policy Board—than on the attitudes of the partners who influenced the Board. In the end, "Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments." 490 U.S. at 256. This type of proof did not fit the *McDonnell Douglas/Burdine* mold, since it did not impeach the credibility of the reason for partnership denial articulated by the Policy Board—reliance on partners' comments—but rather showed that the comments themselves were infected with forbidden bias.

Hopkins did not seek to prove that *all* criticisms of her were the product of stereotype, and Judge Gesell expressly found that some were based in fact. Hence the Policy Board necessarily considered both lawful and unlawful factors in

making its decision. This was the archetype of the "mixed motive" or "dual motive" case.[2]

Noting the presence of lawful as well as discriminatory motives, Price Waterhouse argued that liability under Title VII is fixed only if the plaintiff shoulders the entire burden of proving that the unlawful motive was the "but for" cause of the challenged personnel decision. The Court rejected that approach, holding that liability is also established where the plaintiff proves that discrimination was a "substantial factor" (or "motivating part") in the decision, and where the defendant does not then prove that the same decision would have been made in an unbiased setting. *See* 490 U.S. at 244-45 (plurality opinion); *id.* at 259 (White, J., concurring in judgment); *id.* at 265 (O'Connor, J., concurring in judgment).

In short, the Court did not insist on miracles from plaintiffs caught up in a tangle of lawful and unlawful motives. Instead, it recognized that "Ann Hopkins had taken her proof as far as it could go." 490 U.S. at 273 (O'Connor, J.). This was not sufficient to impose liability, but it was enough to shift the burden to Price Waterhouse to prove that it would have made the same decision in the absence of

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[2] In one sense, all Title VII cases involve mixed motivation, because a person's actions are rarely animated by a single motive. But usually it is possible, using the *Burdine* formula "progressively to sharpen the inquiry," 450 U.S. at 255 n.8, to narrow the field to a choice between two dominant motives—one unlawful, the other lawful. "Mixed motive" is a term of art describing those situations in which the type of either-or analysis contemplated by *Burdine* is not appropriate. *See Price Waterhouse*, 490 U.S. at 247 (emphasis in original):

> the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine's* evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed.

discrimination. And if the firm could not carry that burden, liability would be established.

The Civil Rights Act of 1991, Pub.L. 102-166, 105 Stat. 1072, embodied the Congressional response to a number of the Court's decisions, and "§ 107 [of the Act] respond[ed] to *Price Waterhouse v. Hopkins*." *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994). As amended by § 107, Title VII now provides that liability is established upon a showing that an impermissible reason was a "motivating factor" in an employment decision, "even though other factors also motivated" it. 42 U.S.C. § 2000e-2(m). Relief is limited, however, if the employer can prove that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). Given this change in the law, the proof that Ann Hopkins adduced would today establish a violation of Title VII, and the best that Price Waterhouse could hope for would be to avoid damages and other specific relief by meeting the "same decision" test.

II. A DUAL MOTIVATION INSTRUCTION SHOULD BE GIVEN IN CASES WHERE THE *BURDINE* MODEL IS INAPPLICABLE AND WHERE THE JURY CAN FIND FOR THE PLAINTIFF WITHOUT REJECTING THE DEFENDANT'S NONDISCRIMINATORY EXPLANATION. THESE ARE MOST LIKELY TO BE SITUATIONS IN WHICH THE DECISION-MAKER ACTS AS THE "CAT'S PAW" FOR THE BIAS OF ANOTHER.

Caesars Palace argues that an instruction on dual motivation should be given only in cases in which the plaintiff has elicited direct evidence of discrimination, ostensibly grounding this argument on Justice O'Connor's concurring opinion in *Price Waterhouse*. In fact, Justice O'Connor's opinion is not nearly as narrow as Caesars

contends. In any event, the issuance of a dual motivation instruction should not depend on the presence or absence of direct evidence, because a direct evidence test is both over- and under-inclusive.

A. Direct Evidence Is Neither Sufficient Nor Necessary for a Dual Motivation Instruction

Before giving instructions to the jury, the district court must decide, as a matter of law, whether *Burdine's* assumption of a contest between two dominant motives—one lawful, the other not—plausibly encompasses the evidence presented at trial. *See Price Waterhouse*, 490 U.S. at 247 n.12 ("[a]t some point in the proceedings . . . the District Court must decide whether a particular case involves mixed motives"); *id.* at 278 (O'Connor, J.) ("[o]nce all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it").

If the *Burdine* pretext model fairly governs the evidence, then an instruction on dual motivation should not be given. If not—if the operation of multiple motives is a plausible reading of the record—then the jury should be instructed accordingly. A focus on direct evidence, even assuming an agreed-upon definition, is not helpful in making this assessment.

Assume, for example, the case hypothesized above in which the plaintiff has presented proof of bias that meets the strictest, narrowest definition of direct evidence—a "smoking gun" in the form of a co-worker's testimony that he heard the new boss say, "I fired him because I can't stand blacks." The boss denies making the statement and says he fired the plaintiff because of attendance problems. This would seem to present the jury with a classic binary choice—whom do you believe?—and would easily fit into the *Burdine* model, in which the plaintiff can prevail "directly by persuading the

court that a discriminatory reason more likely motivated the employer." 450 U.S. at 256.[3]

There is no reason to believe that *both* lawful and unlawful motives were at work in the situation described. This being so, it would be inappropriate for the court to instruct the jury on dual motivation. To do so would prejudice the *plaintiff* by giving the employer a "second bite at the apple to show that it would have taken the same action anyway." *Jones v. Washington Metropolitan Area Transit Authority*, 946 F.Supp. 1011, 1017 (D.D.C. 1996), *aff'd in part and vacated in part*, 205 F.3d 428 (D.C. Cir. 2000). Defendants who lose under *Burdine* based entirely on circumstantial evidence do not get a second chance; a defendant felled by a smoking gun should fare no better.

In sum, the presence of direct evidence is not a sufficient basis for an instruction on dual motivation. Nor is it necessary.

Imagine a situation, akin to *Price Waterhouse*, in which a manager acknowledges placing great weight on the recommendations of his foremen when making promotion decisions. A woman was a recent candidate. The foremen generally rated her as well qualified, but some gave muted but legitimate criticism of one area in which she lacked experience. In addition, one of the foremen was harshly negative. In the end, the manager decided against promoting the female candidate. He acknowledged her superior qualifications but felt that the few mild criticisms of her experience, coupled with the harsh overall criticism from one foreman, could not be overcome.

The woman sues. She does not contest the criticism of her experience, but she says that alone should not have doomed

[3] A plaintiff who produces direct evidence of this nature is not required to establish all the elements of a prima facie case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

her candidacy. And she argues that the foreman who was her most strident critic is biased against women. She can offer no evidence directly reflecting gender-based animus—no sexist comments, for example. But she shows that this particular foreman has never recommended a woman for promotion, although he had upwards of twenty opportunities to endorse qualified female candidates. His record also shows that he disciplined women more harshly than men for similar offenses. As in *Reeves*, 530 U.S. at 151, there was an "'obvious difference' in how [the foreman] treated" the men and women under him.

There is a mix of motives in this situation. The manager who rejected the plaintiff's candidacy relied on *both* the legitimate but mild criticisms of her experience, as well as the harsh—and illegitimate—views of one foreman. The either-or choice assumed by *Burdine* is not applicable here. In these circumstances, dual motivation analysis should be employed, and it should not fail for want of sexist commentary by a man who is quite clearly predisposed against women. *Price Waterhouse v. Hopkins* makes this clear.

In *Price Waterhouse*, some of the partners who commented on Ann Hopkins as a candidate for partner used unmistakably sexist language, for example calling her "macho" or saying she should take "a course at charm school." 490 U.S. at 235. And her boss told her that she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* But there were also "gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her." *Id.* An expert witness, Dr. Susan Fiske, testified that conditions that foster stereotyping were present in the selection process for partner, including "Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations." *Id.* at 236. Fiske believed that the sharply critical but gender neutral comments, as well as those that were overtly sexist, were the

product of stereotype. *Id.*[4] In the end, "[t]he trial judge acknowledged that it was impossible to measure the precise role sexual stereotyping had played in the Policy Board's decision to deny Hopkins partnership, but found that the decision was in fact tainted by discriminatory evaluations." *Hopkins v. Price Waterhouse*, 825 F.2d 458, 464 (D.C. Cir. 1987).

This was the record before this Court. However this proof may be characterized, it did not meet the strict definition of direct evidence, *i.e.*, "evidence which, if believed, proves the fact without inference or presumption." *Brown v. East Mississippi Electric Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993). Several types of inferences were necessary in *Price Waterhouse*. For example, the district court had to infer that some of the suspect comments, especially those that were facially neutral, were related to Ann Hopkins' sex. More broadly, the partners who harbored stereotypes based on gender did not admit that they were lobbying against Hopkins because she was a woman; inference was needed here as well. Most pointedly, Price Waterhouse did not admit that comments grounded on stereotype were a substantial factor in the decision to deny partnership to Hopkins. The court had to infer this, too.

All these inferences were easy to draw. They were strongly supported, if not compelled, by the evidence. But they were nevertheless inferences—*conclusions* drawn from the record:

> Certainly a plausible—and, one might say, inevitable—*conclusion* to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the

[4] Dr. Fiske was at Carnegie Mellon University when *Price Waterhouse* was tried in 1985. She now teaches at Princeton and is currently serving as President of the American Psychological Society.

> comments that were motivated by stereotypical notions about women's proper deportment.

490 U.S. at 256 (emphasis added).

Caesars Palace purports to base its argument on Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse*, which frequently uses the term "direct evidence." That opinion, however, is more supple than Caesars suggests, and it understood the inferential nature of the district court's reasoning. Thus Justice O'Connor accepted the D.C. Circuit's characterization of the evidence: "Ann Hopkins proved that Price Waterhouse 'permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner.'" 490 U.S. at 272 (citation omitted). Of course, this was a conclusion drawn from the record—an inference—but it met Justice O'Connor's test:

> Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could *draw an inference* that the decision was made "because of" the plaintiff's protected status.

Id. at 278 (emphasis added).

Immediately before this passage, Justice O'Connor employed an alternate formulation of this test: "What is required is *what Ann Hopkins showed here*: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." 490 U.S. at 277 (emphasis added). In context, then, Justice O'Connor's opinion is not dismissive of inferential (*i.e.*, circumstantial) evidence, but it insists on proof that *directly* ties the impermissible criterion to the employment decision at issue.[5]

[5] *See Thomas v. National Football League Players Ass'n*, 131 F3d 198, 204 (D.C. Cir. 1997) ("[i]n our view, Justice O'Connor's invocation of 'direct' evidence is not intended to disqualify circumstantial evidence nor

The second hypothetical sketched above passes muster here. That is, the strong evidence of the foreman's bias against women may be circumstantial in nature, but it is tied directly to the decision to deny a promotion to the female plaintiff. This evidence is "sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status." 490 U.S. at 278 (O'Connor, J.). Under Title VII today, as amended by § 107 of the Civil Rights Act of 1991, liability is established. 42 U.S.C. § 2000e-2(m). And since both lawful as well as unlawful motivations substantially influenced the promotion denial—*i.e.*, the mild but legitimate criticisms of a number of foremen, and the harsh, discriminatory views of one—an instruction on dual motivation would be warranted, so that the company could have a chance to avoid damages by proving that promotion would have been denied even had the biased foreman refrained from commenting at all. 42 U.S.C. § 2000e-5(g)(2)(B).

B. The Proper Basis for a Dual Motivation Instruction

Casting a net of direct evidence over mixed motives captures both too much and too little. Circumstantial evidence may be used in proving a case involving both lawful and unlawful motives. Conversely, direct evidence (however defined) will not necessarily yield a factual situation warranting an instruction on dual motivation.

As noted above (n.2), virtually every case in fact involves more than a single motive, because most people act for a

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to require that the evidence signify without inference. In context, the notion of 'direct' evidence in Justice O'Connor's concurrence means only that the evidence marshaled in support of the substantiality of the discriminatory motive must actually relate to the question of discrimination in the particular employment decision").

variety of reasons. Nevertheless, it is usually possible to employ *Burdine's* razor to hone the evidence, so that the jury is presented with a choice between two dominant motives—one lawful, the other not. So the first question to be faced, in deciding whether an instruction on dual motivation should be given, is whether *Burdine's* pretext model can comfortably accommodate the evidence. In most cases, it can. But not always. And the cases that are likeliest to involve an ungainly mixture of lawful and unlawful motives are those, like *Price Waterhouse*, that involve an arguably biased person who influences the decision-maker.

In *Shager v. Upiohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990), the Seventh Circuit held that a company is liable where the decision-maker acts "as the conduit of [a subordinate's] prejudice—his cat's-paw." *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 542, 562 (1998) (citing *Shager* for the proposition that "the employer was still liable because the [decision-maker] functioned as the supervisor's 'cat's-paw'"). Most courts of appeals have adopted the same analysis.[6]

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[6] *See Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998) (citing *Shager* and ruling, "we join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence"); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Rose v. New York City Bd. of Ed., C.S.D. No. 13*, 257 F.3d 156, 162 (2d Cir. 2001); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226-27 (5th Cir. 2000); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Simpson v. Diversitech General, Inc.*, 945 F.2d 156, 160 (6th Cir. 1991), *cert. dismissed*, 502 U.S. 1083 (1992); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994); *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998), *cert. denied*, 528 U.S. 930 (1999).

Although the Court did not use the metaphor, *Price Waterhouse* was a classic "cat's-paw" case, and it shows why such cases may not be susceptible to *Burdine* treatment and hence may require a dual motivation instruction. As noted above, Price Waterhouse's Policy Board made the decision on Ann Hopkins' candidacy. Still, individual partners played a pivotal role; they were "agents of influence" who supplied most of the information on which the Policy Board based its decision, and much of this information was biased. Hence the Policy Board "functioned as the . . . 'cat's-paw'" of the biased partners. *Ellerth*, 524 U.S. at 562. But not all the information available to the Policy Board was tainted in this fashion, so the Board ended up with lawful as well as unlawful reasons for rejecting Hopkins, making the *Burdine* model inapplicable.

In *Price Waterhouse*, there was a mix of motives that could not be teased into an either-or choice. This will generally be true in "cat's-paw" cases. An instruction on dual motivation is appropriate in such cases, regardless of the type of evidence in the record. It is essential, though, that the proof establish a direct connection between the biased influence and the challenged decision. *Price Waterhouse*, 490 U.S. at 277-78 (O'Connor, J.).

Something analogous to the "cat's-paw" situation may arise where the evidence shows that an employer maintains a systemic policy or practice of discrimination. If so, the trier of fact will be warranted in believing that the decision-maker was influenced by the discriminatory policy. Here again, however, there may be evidence that other, lawful motives were at play in a particular decision. If so, a dual motivation instruction is appropriate here as well, so that the defendant can have the opportunity to limit relief by proving that the same decision would have been made in the absence of the discriminatory policy. In fact, this is what typically happens in a class action, after class-wide liability has been established. Relief will not be granted to an individual class

member if the defendant can prove that the individual "was denied an employment opportunity for legitimate reasons." *Teamsters v. United States*, 431 U.S. 324, 362 (1977).

A recent, vacated decision of a panel of the Fourth Circuit, *Hill v. Lockheed Martin Logistics Management, Inc.*, 314 F.3d 657 (4th Cir. 2003), *pet. for rehearing en banc granted and opinion vacated* (Feb. 12, 2003), illustrates these principles. The plaintiff, a female sheet metal mechanic, alleged that her safety inspector was biased against women in general, especially older women, and against her in particular, several times calling her a "useless old lady" and other variations on that caustic theme. *Id.* at 660. At Lockheed, three written reprimands could lead to termination; the plaintiff already had one, which was legitimate, but she charged that her inspector trumped up the last two, resulting in her firing by others. *Id.* at 660-62.

The panel majority believed that the plaintiff had "proffered considerable evidence" to show that the biased inspector "had a substantial influence on Lockheed's decision to fire her." 314 F.3d at 671. This was sufficient to warrant mixed motive treatment under Fourth Circuit law, which requires a plaintiff to produce " 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision' . . . [i]n other words . . . 'evidence that clearly indicates a discriminatory attitude at the workplace and . . . illustrate[s] a nexus between that negative attitude and the employment action.'" *Id.* at 665 (citations omitted). And the panel noted that it was using "the term 'direct evidence' to refer to evidence, be it direct or indirect, that is of sufficient strength to warrant use of the mixed-motive framework." *Id.* n.3.

The dissenting judge employed the same analytical framework as the majority. But he believed that liability should not be imposed "for the discriminatory motives of a subordinate employee simply because that employee has

played a role, even a significant one, in the process that led to the employment decision." 314 F.3d at 693. Rather, "the plaintiff should be required to present evidence that the subordinate was the 'actual decisionmaker,' or the one 'principally responsible,' for the decisions." *Id.* He also thought that the inspector's "statements may well have evidenced a discriminatory attitude towards [the plaintiff] because of her age and sex, but the statements did not 'bear directly on the contested employment decision.'" *Id.* at 697 (citation omitted).

For present purposes, the relevance of *Hill v. Lockheed* lies not so much in whether the majority or dissent had the better analysis (although the dissent's insistence on an "actual decisionmaker" is contrary to *Price Waterhouse*, where the biased partners who commented on Hopkins' candidacy were *not* the decision-makers, formal or otherwise). Instead, what matters is that both the majority and the dissent in *Hill* were asking the right questions about the role of the purported "agent of influence" in the firing decision and the connection between his bias and that decision.

It is also significant that *Hill* was a "cat's-paw" case, exactly the type in which *Burdine* analysis might prove wanting. On the majority's view of the record, the plaintiff—having shown that the biased inspector had substantially influenced the decision to fire her—"had taken her proof as far as it could go." *Price Waterhouse*, 490 U.S. at 273 (O'Connor, J.). And this was sufficient to impose liability under 42 U.S.C. § 2000e-2(m)—and so, at an appropriate point in the proceedings, to warrant an instruction on dual motivation.

III. A DUAL MOTIVATION INSTRUCTION WILL OFTEN BENEFIT A DEFENDANT, AND IT BENEFITED CAESARS HERE

In its brief, Caesars Palace warns that, unless this Court acts, floodgates will open and "almost every plaintiff will opt

for [mixed motive] analysis in order to shift the burden of proof on causation to the employer." Brief for Respondent at 29. This assertion ignores an inconvenient circumstance: Costa did not request the dual motivation instruction given by the district court, and the instruction benefited Caesars, not Costa. In fact, one of the more remarkable features of this case is Caesars Palace's utter inability to demonstrate any prejudice flowing from the instruction it challenges.[7]

The district court gave two, partially overlapping instructions on motivation, Nos. 8 and 9. *See* JA 32-33. Instruction No. 8, to which Caesars did not object, said that the plaintiff had the burden of proving that her "gender was a motivating factor" in the adverse work conditions that were the subject of her complaint. That was an accurate statement of Title VII's liability standard.

Following passage of the Civil Rights Act of 1991, in particular § 107 of the Act, it is clear that a Title VII plaintiff can establish liability even if she does not show that discrimination was the dominant cause of the decision under challenge, but she must prove that it was a motivating factor. This is now the liability standard in all disparate treatment cases. *See Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("employers now violate [Title VII] when [an impermissible motive] plays an actual role in an employment decision, regardless of other considerations that may independently explain the outcome"); *Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1350 (7th Cir. 1995) ("under Title VII, as amended by the 1991 Act . . . [a]

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[7] The Solicitor General is also alarmist. But in *Price Waterhouse*, the Solicitor General acknowledged that *defendants* are usually responsible for suggesting "multiplicity of motives." Brief for United States at 12 *in* No. 87-1167. In this regard, the United States defends far more Title VII cases than it prosecutes, and the government *as defendant* has requested dual motivation instructions. *See* discussion below of *Porter v. Agency for International Development*, 240 F.Supp.2d 5 (D.D.C. 2002).

violation . . . is established if a plaintiff can prove by a preponderance of the evidence that discrimination was a motivating factor in the employment decision"); *Borgo v. Goldin*, 204 F.3d 251, 255 n.6 (D.C. Cir. 2000) ("[i]n 1991, Congress overturned *Price Waterhouse* in part, amending Title VII to provide that once a plaintiff proves discrimination to have been a motivating factor, liability is established").

In a case tried under the pretext model, which typically presents the trier of fact with a choice between two dominant motives—one unlawful, the other lawful—a plaintiff who prevails will necessarily satisfy the "motivating factor" test. That is, the jury will have decided that prohibited bias was the dominant factor (if not the sole motivation) causing the challenged decision, so it was necessarily a motivating factor.[8]

The first paragraph of the challenged instruction (No. 9) simply amplified No. 8, saying that, "[i]f you find that the plaintiff's sex was a motivating factor in the defendant's

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[8] Caesars agreed below that the "motivating factor" standard applies to all disparate treatment cases, including those susceptible to pretext analysis. First, the company accepted Instruction No. 8, which required Costa to prove that gender was a "motivating factor" in her treatment. JA 33. Second, the very instructions on *pretext* that Caesars proffered below, which relied on model instructions crafted by the American Bar Association's Litigation Section, likewise employed the "motivating factor" language:

> circumstantial evidence would include proof . . . that would allow one to reasonably believe that gender was a *motivating factor* in the defendant's treatment of plaintiff.
>
> • • •
>
> the plaintiff must prove . . . that her sex was a *motivating factor* in the defendant's decision to discharge her. The plaintiff's sex was a *motivating factor* if you find that it played a role in the defendant's decision, even though other factors may also have played roles in that decision.

JA 23-24 (emphasis added).

treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason." JA 33. Not only was this an accurate statement of the law, it mirrored what Caesars itself proffered in its pretext-based instruction: "the plaintiff must prove . . . that her sex was a motivating factor in the defendant's decision to discharge her. The plaintiff's sex was a motivating factor if you find that it played a role in the defendant's decision, even though other factors may also have played roles in that decision." JA 24. In sum, the first paragraph of Instruction No. 9 did not give Costa anything that she did not have anyway.[9]

This leaves the second paragraph of No. 9, which said that if the jury found "that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons," then "[t]he plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision." JA 33. This also accurately reflects the law, *see* 42 U.S.C. § 2000e-5(g)(2)(B), and in any event Caesars did not object to the language. And this half of Instruction No. 9 benefited only Caesars Palace, because it gave Caesars a chance to avoid damages even if Costa proved that bias was a motivating factor in her treatment. This was not an instruction that any plaintiff would affirmatively offer.

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[9] Caesars italicizes part of the first sentence of the first paragraph of Instruction No. 9—"[y]ou have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons"—suggesting that this formulation may have prejudiced the jury. *See* Brief for Respondent at 44. This is a reach and in any event was not pressed below. At trial, Caesars objected to the court's giving *any* instruction on dual motivation, but it did not object to the language used: "I'll agree with the Court, that it is a reasonable statement of the mixed motive instruction." JA 18.

Employers recognize that an instruction on dual motivation may help them defend EEO cases. For example, in *Jones v. WMATA, supra*, 946 F.Supp. 1011, the plaintiff employed a classic *Burdine* approach to prove that she had been fired for complaining about sex and age discrimination, in violation of the anti-retaliation strictures of Title VII and the Age Discrimination in Employment Act. Throughout the litigation, WMATA steadfastly denied that retaliation played any role in Jones' firing. After the close of the evidence, however, the agency sought an instruction on dual motivation. Judge Lamberth demurred:

> . . . this case was tried—not just pleaded—as a pretext case in which either legal or illegal motives, but not both, underlay the adverse employment actions.
>
> * * *
>
> *In a case tried under the rubric of pretext, the defendant does not get a second bite at the apple to show that it would have taken the same action anyway.* * * * WMATA would at a minimum have been required to introduce evidence of a dual motive at trial. Instead, it argued that a non-pretextual legitimate reason was its sole motivating factor.

946 F.Supp. at 1017 (emphasis added).

More recently, the local United States Attorney's Office tried this approach when representing the defendant in *Porter v. Agency for International Development*, 240 F.Supp.2d 5 (D.D.C. 2002). As in *Jones v. WMATA*, the plaintiff "objected to defendant's request for the so-called 'mixed motive' instruction . . . that offers a complete defense to liability for damages if the employment action in question would have been taken anyway in the absence of discrimination." *Id.* at 7. The court "sustained plaintiff's objection and refused the instruction." *Id.*[10]

[10] Following a jury verdict favorable to the plaintiff, the court itself decided the dual motivation issue, ruling that the plaintiff would not have been promoted even in the absence of unlawful factors. *Id.* at 6. The propriety of the trial judge's deciding this question is not pertinent to the issues before the Court here.

The point here is not that the district courts in these cases were right or wrong in refusing requests for a dual motivation instruction. Instead, the point is that *defendants* were seeking the instruction, and plaintiffs opposed it. The notion that plaintiffs will always opt for a mixed motives approach because it is "more lenient" for them, Pet. App. 53a, or because "plaintiffs enjoy more favorable standards of liability in mixed-motive cases," *Fuller v. Phipps*, 67 F.3d at 1141, is wrong as both a legal and a factual matter.

In the present case, only the second paragraph of contested Instruction No. 9 afforded either party anything that Caesars Palace's own proposed instruction on pretext did not. And the second paragraph benefited Caesars, not Costa. So even if the district court erred in giving Instruction No. 9, the error did not harm Caesars. *See Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 559 (D.C. Cir. 1993) ("[i]t is well established that challenges to jury instructions are subject to the harmless error rule").

IV. COSTA PROVED A VIOLATION OF TITLE VII

The verdict here would easily survive a Rule 50 attack, where the court must "draw all reasonable inferences in favor of the nonmoving party." *Reeves*, 530 U.S. at 150. *See* Statement above and Pet. App. 36a-42a. The question is whether anything about the instructions requires upsetting the judgment. In fact, nothing does. In Instruction No. 8, the court properly (albeit briefly) charged the jury on the measure of proof needed to establish liability under Title VII. JA 33. Courts have upheld verdicts based on instructions virtually identical to No. 8. *See, e.g., Hennessy v. Penril Datacomm Networks*, 69 F.3d at 1350 ("an unlawful employment practice is established when the complaining party

demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"). In any event, Caesars did not object and so cannot challenge Instruction No. 8 here. *See Price Waterhouse*, 490 U.S. at 240 n.5.

There is no problem with Instruction No. 8. That leaves only No. 9, the instruction on dual motivation. JA 33. On this record, it is not clear whether a dual motivation instruction was appropriate. This does not appear to have been a "cat's-paw" situation; nor was there a proven policy or practice of systemic discrimination by Caesars. Costa said that she was fired because of her sex, and Caesars said it was because of her disciplinary record. This would seem to pose the type of either-or choice characteristic of *Burdine's* pretext model, which is unsuitable for dual motivation treatment. Still, the *en banc* court was right in concluding that Costa's evidence, viewed favorably to her, proved a violation of Title VII. Pet. App. 36a-42a. And so, even assuming that the district court erred in giving an instruction on dual motivation, the question is whether Caesars Palace was harmed. And it plainly was not.

Instruction No. 9 benefited only Caesars. It said that the company could avoid damages by meeting the "same decision" test. Assuming that this case could have been resolved in classic binary fashion, Instruction No. 9 gave Caesars an undeserved "second bite at the apple." *Jones v. WMATA*, 946 F.Supp. at 1017. But the instruction did not help Catharina Costa.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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